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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

SALVATORE ZABALDO, Plaintiff and Appellant, v. EDWARD AKSELROD et al., Defendants and Appellants.	B206659 (Los Angeles County Super. Ct. No. BC354599)

APPEAL from a judgment of the Superior Court of Los Angeles County. Jerry K. Fields, Judge. Reversed.

Lisitsa Law Corporation, Yevgeniya G. Lisitsa and Ali Vassigh for Defendants and Appellants The Reliant Group & Edward Akselrod.

Cienfuegos Co. and P. David Cienfuegos for Plaintiff and Appellant.

Following a jury trial, defendants Edward Akselrod and The Reliant Group, Inc. (Reliant) appeal from the denial of their motion for judgment notwithstanding the verdict (JNOV) and complain that the court erred in denying the motion as moot based on its grant of a new trial. Plaintiff Salvatore Zabaldo cross-appeals and asserts that the trial court erred when it granted a new trial because the weight of the evidence purportedly supports the jury's findings.

We find (1) that there is no proper basis in the record on appeal to refute the trial court's factual findings in its ruling on the posttrial motions, and (2) that the proper remedy for the deficiencies in the evidence identified by the trial court is a JNOV, rather than a new trial.

FACTUAL AND PROCEDURAL SUMMARY

On April 30, 2005, Reliant and Zabaldo entered into an agreement whereby Zabaldo sold a promissory note guaranteed by a deed of trust to Reliant for $150,000. On February 6, 2006, Zabaldo and Akselrod signed a settlement agreement whereby, as characterized by Akselrod, the April 30, 2005, "was novated and replaced by a new agreement" whereby Reliant was only to pay a total of $120,000, consisting of $60,000 to Zabaldo and $60,000 to another person (who is not a party to this appeal).[1] After signing the February 6, 2006, settlement agreement, Reliant paid Zabaldo all the money due him pursuant to that agreement. Zabaldo later claimed that when he signed the agreement he was under financial duress because he needed money to pay bills.

Thereafter, Zabaldo sued Akselrod and Reliant, alleging causes of action for rescission and breach of the April 30, 2005, contract. Zabaldo alleged that Akselrod

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[1] The terms of the agreement, which were handwritten by Akselrod on Reliant stationery, were in pertinent part as follows: "This letter serves as a settlement agreement between Sal Zabaldo, Anthony Zabaldo & The Reliant Group c/o Ed Akselrod regarding the note purchased by the Reliant Group from Sal Zabaldo c/o Challenge Development Co. . . . Under the settlement terms Sal Zabaldo will receive a onetime total payment of sixty thousand dollars ($60,000)[,] Anthony Zabaldo to receive total payments equaling ($60,000) sixty thousand dollars and Ed Akselrod c/o The Reliant Group to keep all additional proceeds."

threatened that if he did not sign the settlement agreement, Zabaldo would get nothing under the original April 30, 2005, agreement. Zabaldo also sought to hold Akselrod personally liable under an alter ego theory, alleging a unity of interest and ownership between Akselrod and Reliant, the operation of Reliant as a shell corporation under the complete individual control of Akselrod, and the failure of Reliant to conduct corporate business with any shareholder meetings, records, or minutes of any corporate proceedings.

After the jury trial commenced and Zabaldo rested his case, Akselrod and Reliant moved for a directed verdict. The trial court granted a directed verdict only "as to the breach of contract cause of action," and left remaining only the rescission cause of action as to "the '4-30-07 contract'" (apparently meaning the April 30, *2005* contract). The court allowed Zabaldo to elect between contract or tort damages on the rescission cause of action, and he elected to proceed on tort recovery.

Akselrod and Reliant urge that the evidence at trial established that the only failure that drove the rescission cause of action was the failure to pay the money due. Zabaldo claimed "$60,000 that he did not pay me" and nothing else.

The court instructed the jury that Zabaldo claimed there was no contract and wanted to rescind the April 30, 2005, agreement, but that he could do so only if "the consideration for [Zabaldo's] obligation fails, in whole or in part, through defendant Reliant's fault." The court then instructed the jury as follows: "There cannot be a claim for rescission where the only reason for a failure of consideration is the defendant's neglect to pay money. Consideration means parties agree to give each other something of value, a promise to do something, [and] not to do something may have value. Consideration may be an act, forbearance, change of legal relations, or a promise. One of the essential elements of the existence of a contract is a sufficient cause or consideration."

Regarding the law as to alter ego, the court instructed the jury as follows: "Although it is a general rule that a corporation is an entity separate and distinct from its

shareholders, it is also equally well settled in . . . both law and equity that when it's necessary to prevent fraud or injustice and/or to . . . protect the rights of third persons and accomplish justice, you may disregard the distinct existence of a corporation and its shareholders and treat them as identical. [¶] The term 'alter ego' describes a doctrine, the application of which results in either the obligations of a corporation being treated as those of its owners or the obligations of the owners being treated as those of the corporation. [¶] In order to avoid an abuse of the corporations' privilege, courts look through the form[] behind the corporate entity involved and deal [with] the situation as justice may require. Before a corporation's acts and obligations can legally be recognized as those of a particular person and vice-versa, the following conditions must exist: [¶] It must appear that the corporation is not only influenced and governed by the owner, but that there is such a unity of interest and ownership that the individuality or the separateness of such person and the corporation has ceased and the facts are such that adherence [to] the fiction of the separate existence of a corporation would, under the particular circumstances, sanction a fraud or promote injustice. [¶] Both of these requirements must be found to exist before the corporate existence will be disregarded. If you find that there has been a unity of interest and ownership between the Reliant Group and Edward Akselrod such that the individuality or separateness of Edward Akselrod and the Reliant Group has ceased and that it appears [that] the fiction of the separate existence of a corporation [under the] particular circumstances [would] sanction a fraud or promote injustice, any liability that you find against the Reliant Group should also be attributed to Edward Akselrod."

The jury unanimously returned special verdicts in favor of Zabaldo and against Akselrod and the Reliant Group, and it awarded damages in the amount of $260,000.[2] The jury's responses to the questions posed on the special verdicts were as follows: the

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[2] The amount of damages was apparently based on the $60,000 amount due under the contract, and Zabaldo's speculation in his testimony that the house, which was the subject of the deed of trust, had gone up in value and could have been sold for approximately $200,000 "if it did sell."

consideration for Zabaldo's obligation failed in whole or in part because of Reliant's fault; the failure of consideration was substantial; Zabaldo promptly gave notice of rescission to Reliant; Zabaldo restored or offered to restore everything of value which he had received from Reliant under the contract; Reliant's neglect to pay money to Zabaldo was not the only reason for the failure of consideration; Zabaldo was not guilty of laches in waiting too long to rescind the contract; there was such a unity of interest and ownership between Reliant and Akselrod that their separate personalities did not in reality exist; the result would be inequitable if the acts in question were treated as those of Reliant alone (disregarding the difficulty in enforcing a judgment or collecting a debt); and Akselrod did not act in his official capacity on behalf of Reliant and was acting to advance his own personal interests.

Accordingly, the trial court entered judgment in favor of Zabaldo and against Akselrod and Reliant, jointly and severally, in the amount of $260,000, plus prejudgment interest in the amount of approximately $65,000 and interest from the date of entry of judgment until paid.

Akselrod and Reliant then moved for a new trial. At the same time, they also moved for a JNOV. Both motions were on the same grounds and in virtually the same language. In pertinent part, the motions argued that although a contract may be rescinded for substantial failure of consideration, the verdicts were the result of an erroneous instruction. Specifically, Akselrod and Reliant complained that the jury was advised rescission cannot be had "'where the only reason of a failure of consideration is Defendant's neglect to pay money'" and yet was also advised that consideration is a "'promise to do something or not to do something,'" and that the only evidence of any failure was the failure to pay Zabaldo the $60,000 he was owed.

Akselrod and Reliant also urged that there was no evidence to support one of the elements of alter ego; namely, that there was any fraudulent intent on their part to justify piercing the corporate shield. They also argued, alternatively, that the damages awarded

should be reduced to $40,000, reflecting the $60,000 figure minus fees and costs associated with the foreclosure sale of the property in question.

Zabaldo opposed the motion for JNOV. He argued that the jury's special verdicts were supported by the case law as well as the jury instructions, which were all proposed by Akselrod and Reliant (except the alter ego instruction), and that there was no inconsistency in the jury's special verdicts. Zabaldo also urged there was substantial evidence presented at trial from the testimony of the parties and other witnesses concerning the intentional acts of the failure to pay him the amount he was owed and of the rescission of the contract, as well as evidence of the amount of damages. Akselrod and Reliant filed a reply to Zabaldo's opposition and urged, in pertinent part, that there was no evidence to support one of the requisite elements for an alter ego finding—specifically, no evidence of Akselrod's fraudulent intent to do injustice by the use of the corporate entity.

The trial court granted the motion for a new trial and stated that a JNOV thus became "moot." The court remarked, "A new trial. I am not going to give you judgment. The jury can do that."

The trial court explained in its written order that after reviewing the pleadings and the trial transcript and weighing all the evidence, the jury should have reached a different verdict for the following reasons: "1) The matter submitted to the jury was the rescission of the contract of April 30, 2005 between Plaintiff and Defendant Reliant Group, Inc. The evidence of rescission was based upon failure of the consideration for this contract. The evidence presented was insufficient to establish a failure of consideration. The evidence clearly established that Defendant corporation failed to pay Plaintiff the balance of the contract price of $60,000.00 less certain costs incurred in saving the property involved from foreclosure. Plaintiff testified that all he was claiming was $60,000 that wasn't paid him. (Tr. p. 81:4-6.) The Court instructed the jury that 'there cannot be a claim for rescission where the only reason for a failure of consideration is the defendant's neglect to pay money. . .' The only evidence of failure of consideration was the failure to

pay money. Thus the evidence was insufficient to support the jury's finding which failed to follow the Court's instruction.

"2.) The evidence was insufficient to prove that Reliant Group, Inc. was the alter ego of Defendant Akselrod. 'In California two conditions must be met before the alter ego doctrine will be invoked. First there must be a unity of interests and ownership between the corporation and its equitable owner that the separate personalities of the corporation and the shareholder do not in reality exist. Second, there must be an inequitable result if the acts in question are treated as those of the corporation alone (citations). "Among the factors to be considered in applying the doctrine are commingling of funds and other assets to the two entities, the holding out by one entity that it is liable for the debts of the other, identical equitable ownership in the two entities, use of the same offices and employees, use of one as a shell or conduit of the affairs of the other (citations)," other factors which have been described in the case law include inadequate capitalization, disregard of corporate formalities, lack of segregation of corporate records . . . . Alter ego is an extreme remedy, sparingly used (citations)' *Sonora Diamond Corp. v. Superior Court* (2000) 83 Cal.App.4th 523, 538. [¶] There was no evidence presented of any of the factors set forth in the above case presented to the jury as to the contract of April 30, 2005.

"3.) The damages of $260,000 awarded by the jury is unsupported by any evidence. Such damages were entirely speculative, and excessive (CCP § 657(5)). The only evidence presented of damages was Plaintiff's testimony that $60,000 would make him whole. There was also evidence Defendants sold the house after saving it from foreclosure and bankruptcy, for around $450,000. Plaintiff also speculated that if it did sell, he would be getting the money, 'at least $200,000.' (Exhibit K, Tr. p. 74.)

"This case shall proceed on the rescission cause of action of the 4/30/05 contract as well as to the contract action relating to that action."

Akselrod and Reliant appeal and urge that the trial court should have granted JNOV, rather than a new trial. Zabaldo cross-appeals and urges that the trial court

properly denied JNOV, but that the court erred when it granted a new trial because the weight of the evidence was not against the jury's findings.

DISCUSSION

Akselrod and Reliant contend that the trial court erred in granting a new trial as to the breach of contract action rather than granting a JNOV, and they seek reversal of the order denying a JNOV and instead urge entry of judgment in their favor. We agree that the proper remedy for the deficiencies in the evidence identified by the trial court is a JNOV, rather than a new trial.

Code of Civil Procedure section 657[3] mandates, in pertinent part, as follows: "A new trial shall not be granted upon the ground of insufficiency of the evidence to justify the verdict or other decision, nor upon the ground of excessive or inadequate damages, unless after weighing the evidence the court is convinced from the entire record, including reasonable inferences therefrom, that the court or jury clearly should have reached a different verdict or decision." Here, the trial court explained in its written order the following deficiencies in the evidence: (1) the requisite consideration was lacking to support the alleged rescission of the April 30, 2005, contract because the only failure was the failure to pay the money due;[4] (2) the evidence was insufficient to prove that Reliant was the alter ego of Akselrod; and (3) the amount of damages ($260,000) awarded by the jury that was unsupported by any evidence.

However, the trial court did not conclude that any evidence or reasonable inferences from the evidence could have "clearly" compelled the jury to reach "a different verdict or decision." (§ 657.) Thus, pursuant to section 657, the factual deficiencies found by the trial court do not necessarily warrant a new trial, rather than a JNOV.

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[3] All statutory references are to the Code of Civil Procedure unless otherwise indicated.

[4] Zabaldo testified that he was claiming "$60,000 that he [Akselrod] did not pay me" and nothing else.

Zabaldo attacks the trial court's factual findings but has failed to provide a complete record on appeal. Because the appellate record contains only some excerpted portions of the trial transcript and only some of the jury instructions, Zabaldo cannot show "by an adequate record" (*In re Kathy P.* (1979) 25 Cal.3d 91, 102) the court's purportedly erroneous evidentiary analysis on the issues of rescission, alter ego, and damages. We thus presume the record contains evidence to sustain the trial court's factual findings on those issues. (See *Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881; see *Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1295-1296; *Davenport v. Unemployment Ins. Appeals Bd.* (1994) 24 Cal.App.4th 1695, 1700.)

Presuming, as we must, the adequacy of the trial court's factual findings, we now turn to the court's application of those facts to the law. After detailing in its order the deficiencies in the evidence on the issues of rescission, alter ego and damages, the trial court apparently just opted to defer the resolution of those matters to a new jury, which then could decide the issues one way or the other. However, Akselrod and Reliant were entitled to a JNOV (rather than having it denied as moot).

A motion for JNOV should be granted if it appears from the evidence, viewed in the light most favorable to the party securing the verdict, that there is no substantial evidence to support the verdict. (*In re Coordinated Latex Glove Litigation* (2002) 99 Cal.App.4th 594, 606.) The purpose of a JNOV is "to allow a party to prevail as a matter of law where the relevant evidence is *already in*." (*Fountain Valley Chateau Blanc Homeowner's Assn. v. Dept. of Veterans Affairs* (1998) 67 Cal.App.4th 743, 750.) A JNOV spares "the moving defendant from the necessity of undergoing any further exposure to legal liability when there is insufficient evidence for an adverse verdict." (*Ibid.*)

Accordingly, Zabaldo should not be given a second bite at the apple with a new trial just because of insufficiency of the evidence. If the defects in plaintiff's case are not due to any erroneous ruling by the trial court but due to a failure to present a prima facie case, a JNOV is properly granted. (*Garretson v. Harold I. Miller* (2002) 99 Cal.App.4th

563, 574-575.) Akselrod and Reliant should not be forced to undergo a second trial when they were entitled to judgment as a matter of law.

Accordingly, the order directing a new trial should be reversed, and a JNOV must be granted instead.[5]

DISPOSITION

The order under review is reversed, and the trial court is directed to enter a JNOV in favor of Akselrod and Reliant.

Akselrod and Reliant are entitled to costs on appeal.

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BOREN, P.J.

We concur:

DOI TODD, J. ASHMANN-GERST, J.

[5] Finally, we note that Akselrod and Reliant filed in this court a motion for summary reversal, requesting reversal of the order under review with directions that the trial court rule on the merits of their motion for JNOV. In view of our disposition of the present appeal, that motion is denied as moot.